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Supreme Court of the United States

October Term, 1966

No. 254

THEODORE ROOSEVELT STOVALL,
Petitioner,

vs.

Honorable WILFRED DENNO, Warden,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement

Theodore Roosevelt Stovall was indicted by a Nassau County Grand Jury on August 31, 1961, for Murder First Degree (2 cts.), as well as Attempted Murder First Degree.

The first count of murder charged Stovall with killing Dr. Paul Behrendt by stabbing him to death with a knife during a burglary in the Doctor's Garden City home.

The second murder count has reference to the same homicide but the charge is styled in common law terms.

The third count has reference to the petitioner's attempt to murder Dr. Frances Behrendt, the wife of the deceased, at the same time.

After a jury trial, Stovall was convicted in the Nassau County Court of Murder First Degree (felony murder), and Murder Second Degree under the common law charge as well as Attempted Murder in the First Degree.

The death sentence was imposed on September 6, 1962, for Murder First Degree whereas Stovall was sentenced to 40 years to life for Murder Second Degree and 12½ to 25 years for attempted Murder First Degree with the direction that the last two sentences be served consecutively.

The death judgment pursuant to New York procedure was reviewable directly by the New York State Court of Appeals where the verdict and sentence was unanimously upheld (13 N.Y. 2d 1094). So much of the appeal as related to Murder Second Degree and Attempted Murder in the First Degree was dismissed because the review should have been by the Supreme Court, Appellate Division, Second Judicial Department.

The remittitur was amended to show that Stovall's constitutional rights had not been violated (13 N.Y. 2d 1178).

No application was ever made for a writ of certiorari. Thereafter, an application was made in the United States District Court, Southern District of New York, for a writ of habeas corpus, which application was denied by Judge Wyatt on July 14, 1964.

A timely application for a certificate of probable cause and leave to appeal as a poor person was granted on September 9, 1964, and a notice of appeal was filed on September 10, 1964.

On January 21, 1965, argument of the appeal was had before Circuit Court Judges Moore, Friendly and Marshall, and on March 31, 1965, the order was reversed "with instructions that the writ issue unless, within a reasonable

time, New York affords Stovall a new trial," because the police authorities of Nassau County unconstitutionally interfered with Stovall's Fifth and Sixth Amendment rights. Judge Moore dissented.

A petition for re-hearing en banc was granted and the order of the court was vacated by the en banc decision.

By order of this Court dated June 20, 1966, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was granted. By the same order, permission to proceed as a poor person was granted.

At the trial and in the New York State Court of Appeals, petitioner was represented by Nicholas Castellano, Esq.

In the District Court, the United States Court of Appeals and in this Court, petitioner is represented by Anthony F. Marra, Esq., Legal Aid Society of New York (Leon B. Polsky, Esq., of counsel).

The People of the State of New York were represented at the trial by Assistant District Attorney Harold Spitzer of the Nassau County District Attorney's office. In the New York State Court of Appeals, the People were represented by Nassau County Assistant District Attorney Henry P. DeVine. The Warden has also been represented throughout by Henry P. Devine, Assistant District Attorney.

Opinions

The District Court opinion of Judge Wyatt (* 14-18) is not reported. The panel opinion of the United States Court of Appeals (24-35) is unreported. The en banc opinion of the Court of Appeals (37-59) is reported at 355 F. 2d 731.

Jurisdiction

The authority of this Court to entertain the appeal will be found in 28 U.S.C. 1254(1).

Constitutional Provisions Involved

Dr. Paul Behrendt was murdered in his Garden City home during the night of August 23, 1961. His wife, Frances, also a medical doctor, was nearly murdered by Stovall at the same time.

Stovall was arrested at 4 p'clock the afternoon of August 24, 1961, at his sister's home in the adjoining community of Hempstead, and was arraigned August 25, 1961, before a magistrate, charged with First Degree Murder for stabbing Dr. Paul Behrendt to death at which arraignment, he was fully and completely advised of his right to counsel and to a formal hearing.

The conceded facts are that Stovall advised the magistrate that he would retain counsel of his own choosing so the formal arraignment was adjourned to August 31, 1961, to permit Stovall to retain counsel.

The arraignment proceedings occurred in the Magistrate's Part of the First District Court, Mineola, County of Nassau. Stovall was remanded into the custody of the Warden of the Nassau County Jail situated in nearby East Meadow. Transportation of the prisoner from the Magistrate's Court to the jail was the responsibility of the arresting Nassau County detective. On the way from the court to the jail, the authorities stopped at the Mineola Hospital some few block from the court where the prisoner was taken before Dr. Frances Behrendt in her hospital room for identification purposes.

Proof of this fact was established at the trial *without objection.* The lawfulness of this item of evidence, *i.e.* Dr. Frances Behrendt's trial testimony relative to the showup in her hospital room, was actually challenged for the first time in the United States Court of Appeals. It was there argued that with the commencement of the criminal proceeding against the accused, his right to counsel

attached and the showup thereafter not only interfered with Stovall's right to counsel but also compelled Stovall to incriminate himself.

Specifically, the case calls up the Fifth, Sixth and Fourteenth Amendments to the Constitution insofar as they involve the right of an accused to counsel, and his privilege not to incriminate himself with reference to a "showup" after the criminal proceedings have commenced. Also, it is contended that because Stovall was the only negro in the hospital room, the identification procedures fell below the minimum standard circumscribed by the due process provisions of the Fourteenth Amendment.

It is to these points that the brief shall be essentially directed.

The Evidence

Helen Sims (396, *et seq.*) was a switchboard operator in the Garden City Medical Center and, at about 12:45 A.M. she received a frantic call for help from Dr. Frances Behrendt who was screaming over the line, "'Murder, murder, murder'" (400). Immediately, Mrs. Sims put a call through to Lieutenant Hausser of the Garden City Police Department.

Lieutenant Edwin F. Hausser (259, *et seq.*) is a twenty-nine year veteran of service with the municipal police force for Garden City. According to Lt. Hausser, he was on duty when he received a call from Mrs. Sims as a result of which he went to the Behrendt residence at 79 Pine Street in Garden City arriving at 12:55 (264). Lt. Hausser immediately surveyed the situation and to gain entrance was compelled to break his way into the premises, which he did, arriving in the kitchen.

According to the Lieutenant, he discovered the deceased, Dr. Paul Behrendt, lying dead on the kitchen floor. Immediately, he conducted a search of the premises and on the

second floor he discovered the victim's wife, Dr. Frances Behrendt, in the upstairs bedroom, in an hysterical condition completely covered with blood.

It was the uncontradicted testimony of Lt. Hausser that a survey of the premises revealed that all of the doors were locked, but he discovered a break in the screen (266, 284, Peo.'s Ex. 5) and he also observed that a window had been pushed open (286, Peo.'s Ex. 5).

Continuing, Lt. Hausser described for the jury the death scene as follows: First, he observed a light on over the kitchen sink (327) and he also observed that a light was on in the cellar (331) and also that there were lights on in the dining room and in the hall (333).

Lastly, the witness noticed that in the deceased's hand as he laid on the floor dead, covered with blood, was the telephone receiver which, of course, was off the hook (300). This most dramatic scene was pictured in People's Exhibit 9.

In the meantime, and before any further search of the premises had been conducted, Lt. Hausser put a call through for a neighbor of Dr. Behrendt, a Dr. Foehr who arrived at the murder scene almost immediately.

Dr. Joseph E. Foehr (378, *et seq.*) was a friend of the deceased and according to the witness, he arrived at the scene of the murder shortly after 1:00 A.M. where he found Dr. Behrendt lying on the floor in the kitchen and he quickly determined that Dr. Paul Behrendt was dead. Immediately, he ran upstairs where he found Dr. Frances Behrendt in the bedroom hysterical and in a state of shock as a result of the terrible knife wounds and the huge loss of blood. According to Dr. Foehr, he diagnosed her condition as critical and immediately made the necessary arrangements to have her transferred to the Nassau Hospital, which was in the adjoining community of Mineola.

Christian Siegmann (477, *et seq.*) was the next witness called by the prosecution and he was summoned for technical reasons, it appearing that he was a surveyor and he had prepared a floor plan of the death scene as well as the surrounding neighborhood and People's Exhibits 14 and 15, which fairly represented the inside of the Behrendt home, as well as the outside, were introduced into evidence through this witness.

The first really important witness called by the prosecution was Detective Fred Catapano (514, *et seq.*) who was a detective in the Nassau County Police Department. According to Detective Catapano, he arrived at the scene at about 2:00 A.M. and he immediately went into the kitchen where he observed the body of the deceased, as well as an overturned refrigerator. According to Detective Catapano, the kitchen was in a shambles (517).

Almost immediately, Detective Catapano was directed to canvass the neighborhood for the murderer and he did this continuously until about 5:30 A. M. when he returned to the scene of the stabbing. At this point he re-entered the kitchen and he observed that the overturned refrigerator had been righted and on the floor where the refrigerator had been, he noticed a ripped and bloody shirt. Inside the shirt was a key chain with three keys (518-519) which the witness recovered and immediately turned over to Detectives Stalter and Rofheart who, at this point, were jointly carrying the case (525).

The key to this case was the keys for it led the investigating authorities to the Abraham & Straus people where it was determined that the key in question belonged to a Theodore R. Stovall who was carried on their employment records as a resident of 111-10 141 Street, Jamaica 36, New York.

At this time the prosecution called John R. Randall (559, *et seq.*) who swore he was the head of the Record

Section for Abraham & Straus and he determined from the store employment records that on the evening of August 23-24, 1962, Theodore R. Stovall was an employee of the company and when hired he was assigned Locker 358 for which he received a key.[1]

The next witness called by the District Attorney was Arievenia Paschal (624, *et seq.*) who declared under oath that she was a friend of the defendant, Theodore R. Stovall, and from time to time she used to take his clothes to a Chinese laundry on Sutphin Boulevard, about five blocks from her home which was at 111-10 145th Street, Jamaica.

From the laundry mark found on the shirt on the kitchen floor, the police were led very quickly to Go Yee, who ran a Chinese laundry at 112-20 Sutphin Boulevard, Jamaica.[2] Mr. Yee was shown People's Exhibit 16, the bloody shirt, and he recognized the laundry mark as belonging to him and he also identified the Paschal woman as a customer.

In the meantime, while the police were following their leads, which more and more were pointing toward Theodore R. Stovall, Dr. Frances Behrendt had been moved to the Nassau Hospital where her life was saved by Dr. E. T. Montgomery, a friend.

Dr. Montgomery testified (726, *et seq.*) that he has been specializing in general surgery since 1936 and was at the time retired Chief of Surgery at the Nassau Hospital and currently President of the Medical Board.

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[1] Key #358, which led the authorities through Abraham & Straus to Stovall was received into evidence later on in the trial when Detective Stalter testified that the defendant admitted the key was his (820).

[2] At the outset it was touch and go whether Go would be permitted to testify because of the confusion over whether he was to be sworn on a Bible or a chicken's head (652). The matter was resolved to the defendant's satisfaction and no question was raised on this appeal relating to Mr. Go Yee.

Dr. Montgomery found Dr. Behrendt in the emergency room when he arrived at the hospital at about 2:15 in the morning of August 24th. A brief examination revealed that she had been badly cut and was in very serious condition. Dr. Montgomery described the result of his examination thusly (734-737):

"Q. All right, just tell us what you observed. A. Well, she was bleeding from multiple wounds. She was in shock, rapid pulse with a low blood pressure. Her skin was cold and clammy. She was conscious but very visibly frightened and anxious.

Q. Did you treat her? A. I did.

Q. Will you describe, please what you did. A. At the time I saw her in the emergency room the treatment had already started. They were giving her an intravenous solution of dextran, which is a substitute for blood. She was then ordered to have blood transfusions because she had lost blood. We examined her as well as we could in the emergency room, determining that she was losing more blood and ordered her to the operating room as quickly as we could.

Q. And what happened there, Doctor? A. Well, she had lacerations of the body.

Q. Did you then examine her completely? A. Yes.

Q. All right. Would you be good enough then to tell this jury what injuries, if any, you observed. A. She had seven lacerations on her body, one on the right back part of her scalp, several on her shoulder, arm, a long six-or-seven-inch laceration right down to the ribs on the right side under her right shoulder blade. She had another laceration on her left side, which had penetrated the chest cavity. She also had another small laceration up in the abdomen up underneath her ribs just to the left of the center of the body. There were, I think, seven lacerations in all, one of which was bleeding rather profusely, the long one back here (indicating) which had gone right through the muscles.

Q. Did you operate? A. Yes. We cleaned all these wounds up and then proceeded to sew up the lacerations. The one in the chest cavity was rather

small . Dr. Mangiardi, a specialist in thoracic surgery came in to help because of this laceration which had penetrated her left chest cavity and he put a tube into the chest cavities through the ribs in order to release air that had accumulated there. We probed the small laceration of the abdomen."

The defense reserved their right to cross-examine Dr. Montgomery for later in the trial and they exercised their privilege near the end (2613, *et seq.*). At this time, the Doctor corrected his testimony on direct wherein he noted that there were six or seven lacerations on Mrs. Behrendt's body and he changed this to eleven (613-614).

The Doctor's testimony regarding the severity of the wounds suffered by Dr. Behrendt was developed in very great detail on cross-examination (2615-2706) which proves that Mrs. Behrendt was stabbed both from the front and the rear. Further, that at least two of the stab wounds were critical; one in the abdomen and the other below the right shoulder blade, both of which severed arteries causing severe internal bleeding in the case of the stomach wound and external bleeding from the right shoulder injury.

In the Doctor's opinion the injuries could have been caused by a knife.

Coincidentally, with all of this, a young patrolman in the Garden City Police Department was driving his prowl car in the general area and at about 6:50 in the morning at a point one block north of the murder scene, he noted on the shoulder of the road an umbrella. As everyone should know, the Village Fathers in Garden City keep their community spic and span and they don't tolerate umbrellas being left lying around on the side of the road. Accordingly, Patrolman Gebhardt stopped his car, picked up the umbrella and believing that it might have some bearing on the murder, he drove immediately to the Behrendt house where he handed the umbrella to Detective Statler.

One of the more important witnesses summoned by the People was Boyden Stalter (783, *et seq.*) of the Nassau County Police Department. Detective Stalter testified that on the night of August 24th he was attached to the Third Squad and he arrived at the Behrendt home at about 1:15 where he met Lieutenant Hausser of the Garden City Police Department.

Detective Stalter went immediately into the kitchen where he found Dr. Behrendt lying dead on the kitchen floor in a pool of blood with the telephone receiver lying across the upper chest or throat portion of the victim (784-786). Detective Stalter corroborated Lieutenant Hausser and Detective Catapano regarding the kitchen scene (*supra*).

Realizing immediately that he could do nothing for Dr. Paul Behrendt, he went upstairs where he found the victim's wife, Dr. Frances Behrendt, also in a large pool of blood. According to the Detective, Dr. Frances Behrendt was conscious at the time so he attempted to question her. Also and at the same time, he called to Detective Archer, who was still downstairs, who called for additional assistance.

Detective Stalter, during his search of the premises, testified that he observed a knife handle with a broken blade on the table in the dining room and a blade with no handle on the kitchen floor lying in a pool of blood (799).

The next most important fact testified to by Detective Stalter has reference to his confrontation with the defendant at police headquarters late on the afternoon of August 24th when he showed him the umbrella and the keys and the defendant admitted they belonged to him. According to Detective Stalter, the defendant said one of the keys was for his locker at Abraham & Straus and the remaining two were for the front and back doors respectively of his residence at 111-10 145th Street, Jamaica.

Two days later, which would be August 26th, Detective Stalter went to Jamaica where he tried out the keys and he found that they did, in fact, open Stovall's front and back doors, and he also went on into Brooklyn to the Abraham & Straus Department Store where he found that the third key opened Stovall's locker which was #358.

Following Detective Stalter to the stand was Dolores Ramos (1259, *et seq.*), a technical witness, called by the prosecution to identify the white jacket belonging to the deceased (Peo.'s Ex. 30). The Ramos girl testified that she was employed by the Professional Linen Service and Dr. Behrendt was a customer and she wrote Dr. Behrendt's name in People's Exhibit 30 for identification purposes in connection with her work.

Jose Diz (1421, *et seq.*) was a driver for the Professional Linen Service and he testified that he recognized People's Exhibit 30 as one of his products which he delivered to the deceased.

The next most important witness called by the authorities was Captain William Hynes of the Detective Division of the Nassau County Police Department. Captain Hynes has been a member of the force for thirty-five years and on the afternoon of August 24, 1961, at about 4 o'clock, he proceeded to 85 Wellington Road, Hempstead, a village immediately south of Garden City. The premises were occupied by Shirley Stovall Brown, a sister of the defendant. According to Captain Hynes, he was accompanied by Inspector Lada and Lieutenant Tuthill. Hynes went to the rear door and Inspector Lada and Lt. Tuthill to the front door and all three were led into the premises without objection by Shirley Stovall Brown.

Captain Hynes testified that he inquired about her brother "Teddy Bear" and Shirley Stovall Brown told them he was in an upstairs bedroom and she took them all upstairs where she identified her brother (1269-1271) who was immediately placed under arrest by Inspector Lada.

Simultaneous with the arrest of the defendant by Inspector Lada, Captain Hynes seized a white jacket from the clothes closet in the room as well as a pair of men's black trousers that were lying on the floor and also a pork pie hat (1281-1364).

Captain Hynes concluded his testimony with the information that he turned over the white jacket, as well as the hat and trousers to Detective Rieder of the Technical Research Bureau of the Nassau County Police Department (1365-1368).

The People next called Vincent G. Thornton (1427, *et seq.*), Deputy Chief Inspector, who was the commanding officer of the Identification Bureau of the Nassau County Police Department. According to Chief Thornton, he arrived at the death scene in the early morning hours of the 24th and he secured the telephone, the knife handle and blade, as well as the torn shirt and he processed everything except the shirt for fingerprints. Chief Thornton testified the tests were inconclusive so then turned the exhibits over to Detective Rieder.

Following Chief Thornton was Dr. Leslie Lukash (1551, *et seq.*) who is the Chief Medical Examiner for Nassau County. Dr. Lukash declared that he performed the autopsy on the victim and he described his findings thusly (1560-1571):

> "Q. All right. Now, will you be good enough to explain to this jury just what injuries if any, you found upon autopsying this body? A. Yes. We removed Dr. Behrendt to the morgue and made an examination of the body. And as I said there were two major wounds, one over the left upper chest and one over the left lateral chest. In addition there were other superficial linear abrasions not penetrating the skin. The one knife wound was present over the left clavicle and extended downward in a downward, inward and medial direction penetrating the breast plate, crossing over the middle portion of the

chest or the mediasternum, the medical terminology, and lacerated the right lung. This extended for a distance of approximately six inches.

The other major wound was present over the left lateral chest and this was a gaping-type wound measuring approximately 4 by 1½ inches and it penetrated through the fat fracturing the four, five and six ribs, again went in an inward, medial direction and slightly downward, cut the front and back part of the heart, cut the diaphragm, severed the front portion of the stomach and lacerated the uppermost portion of the liver. And this knife wound was again approximately 6 to 6½ inches in depth.

There was a superficial abrasion over the right forearm. This was a linear type abrasion, almost scratch mark in appearance, and there was another very superficial abrasion linear in characteristics over the right chest.

He also had a very superficial wound of the skin over the left abdomen. Dr. Behrendt had these two major knife wounds of the chest. The death resulted from massive hemorrhage, and his left pleura cavity had over a quart and a half of blood and his right pleaura cavity had approximately 400 cc. of blood. These were the major wounds of the deceased.

We did examine all organs. We examined his brain, we sent tissues away for histological studies and we sent tissue away for toxological examination.

The death as I said resulted from hemorrhage from penetrating knife wounds of the chest, heart and lungs, lacerating the stomach and the liver.

Q. Now, these two penetrating knife wounds that you have described, can you state whether either one of them would be a competent and producing cause of death? A. Either one could be a competent producing cause of death, but there is no question that one could cause instantaneous death whereas the other would not.

Q. Now, which of these two knife wounds, Doctor, would cause instantaneous death? A. The knife wound in the left lateral chest that severed the four ribs and cut the anterior and posterior or front and back part of the heart.

Q. These parts were actually cut? A. Severed, yes, just sliced through.

Q. Of the heart itself? A. Of the heart itself.

Q. Now, Doctor, this wound that you have just described now, you followed the path of that particular knife wound, did you? A. Yes, I did.

Mr. Spitzer: Would the court attendant please stand.

Q. Will you describe for this jury the path of this wound on the court attendant? A. The wound was a gaping wound of the skin which measured approximately four by one and a half inches and was located approximately in this area (indicating). The fourth, fifth and sixth ribs were cut through.

Q. Where would that approximately be? A. Right approximately here (indicating). And the path of the knife went in this direction cutting the front and back part of the heart, slicing it through, lacerating the diaphragm that lies just beneath the heart, cutting the stomach which lies in close proximity to the diaphragm and then cutting the upper surface of the liver which again lies contiguous with the diaphragm.

Q. Where approximately would the liver be located? A. The liver would be approximately here, going from here, but it is the left portion of the liver that was lacerated (indicating).

Q. Would that blow require a light or a forceful thrust? A. This would require a considerable force and I would say a considerably strong forceful thrust.

Q. These ribs that were severed, you say the fourth, five and sixth? A. They were cut right through, yes.

Q. Of what material do these ribs consist of? A. Bone.

Q. And the bone was cut right through? A. Cut right through.

Q. Now, with respect to the other penetrating wound, would you be good enough, Doctor, to demonstrate where that was? A. This is the left clavicle and the other wound was present just above the left clavicle and it likewise went in a downward, inward direction and crossed this path from left to right in

a downward direction cutting through the upper part of the breastplate, cutting across the middle portion of the chest and then lacerating the right lung in its most upper portion.

Q. Where, approximately, is the right lung? A. Right approximately here (indicating). And this knife wound went in this direction (indicating). Both wounds went from a left to a right direction in a downward, inward path.

Q. Now, that particular wound that you have just described, would that be produced by a light or a heavy thrust? A. Heavy thrust. This wound or this knife went through the breastplate, the upper portion of the breastplate, which again consists of cartilage and bone and it was an injury of considerable force in order to cut through the bone.

Q. This breastplate that was penetrated consists of bone and cartilage? A. That's correct.

Q. And this knife went right through it? A. It went right through it.

Q. Doctor, I show you the blade on People's Exhibit 23 and the handle with the stub of a blade which is People's Exhibit 22, both for identification, and ask you whether that blade in your opinion would be a competent, producing cause of the injuries that you found? A. Yes, this knife could produce the wounds.

Q. Doctor, I show you this photograph, People's Exhibit 9 in evidence, and ask you whether you recognize the body shown on that picture? A. Yes, I do.

Q. Who is that? A. This is Dr. Behrendt lying on the kitchen floor as I saw it when I arrived at the scene.

Q. Is this the body on which you performed the autopsy? A. That's correct."

Of particular importance to the investigation was the discovery by Dr. Lucash in the Meadowbrook Hospital of a piece of shirt lodged in the armpit of the deceased which was immediately turned over to Inspector Carpenter and Detective Rieder of the Technical Research Bureau, both of whom were present.

Detective Robert B. Rofheart (1702) is a veteran member of the Detective Division of the Nassau County Police Department and a member of the Homicide Squad at the time of the murder. On the date of the trial Detective Rofheart had retired. Detective Rofheart's testimony corroborates that of Detective Catapano, as well as the other police officers, who testified regarding the murder scene.

The main thrust of Detective Rofheart's testimony is to the effect that the defendant admitted the keys found at the scene were his although the defendant steadfastly denied killing the victim (1706-1707). According to Detective Rofheart, Stovall maintained throughout the questioning that he was at his sister's house on Wellington Road in Hempstead, throughout the whole of the evening in question (1707-1708).

Cross-Examination

During the cross-examination Detective Rofheart was questioned about his visit to the Hospital to confront Mrs. Behrendt with the defendant. The nub of the detective's testimony *as brought out on cross-examination* is that Mrs. Behrendt identified the defendant as the man who attacked her husband and herself and whom she met face to face in the kitchen of their home on the fateful night (1803-1807).

The cross-examination of Detective Rofheart is also notable for many other things including the first mention before the trial jury of one of the most important clues which led the police to the defendant and which ultimately singled out Stovall as the killer.

At about 8 o'clock on the morning of August 24th, Detective Rofheart received a telephone call from a young fellow, who wished to remain anonymous, who reported that on the previous night someone, who later turns out to be identified as the defendant, made a telephone call from the Oasis Bar and he had a distinct recollection of the number which he gave to Detective Rofheart (1835-1836).

According to Detective Rofheart, he immediately called the number which turned up Walter Girodeau who admitted that on the previous night, about 10:30, he had received a telephone call from the defendant, Stovall, and he told Detective Rofheart that Stovall lived in Jamaica and he had a sister in Hempstead and he gave the detective both addresses (1840, 1857-1859).

Charlie Rice (1863, *et seq.*) was the owner and landlord of the premises at 111-10 145th Street, Jamaica, which he occupied. Rice testified that he rented the basement to the defendant and that he gave him keys to the front and back doors of the premises.

The next witness was Rosier Brown (1908, *et seq.*), the boy friend of Shirley Stovall, the defendant's sister. According to Brown, on the night of August 23rd, he went to visit his girl friend who lived at 85 Wellington Street, Hempstead, and he arrived at about 7:30 or 8 o'clock.

From the witness' testimony, it would appear that the premises is a rooming house and Miss Stovall occupied at least one of three of the upstairs rooms. According to Brown, the defendant arrived at about 9 o'clock and they drank some Christian Brothers Brandy, after which the defendant left to return to Jamaica on the 11 o'clock train.

Insofar as the defendant was concerned, Brown declared that he was wearing dark pants, a white shirt, hat and shoes and he was carrying an umbrella when he left (1913-1917). Thereafter, Brown decided to stay over so he went to bed and so did Miss Stovall. All of a sudden, at about 1 o'clock, the defendant returned to the one-room residence of his sister, Miss Stovall, without the umbrella or his white shirt.

According to Brown, the defendant was wearing a white coat, which he compared to the white coats worn by doctors, and the defendant's trousers, socks and shoes were all

blood-stained. In fact, Brown testified that the defendant had blood on his face and arm, which the defendant tried to wipe off, and failing this, sister Shirley pitched in to help clean him up.

Of course, the bizarre impression created by "Teddy Bear" literally covered with blood and wearing a white doctor's coat in place of his own dress shirt, undoubtedly aroused the curiosity of both Miss Stovall and Mr. Brown so that they got out of bed to question the defendant and this is what Brown told the jury that Stovall said (1923-1928):

> "Q. Did you have some talk with him? A. Yes. Q. Did you do anything with him? Just explain what went on from that point on. A. Yes. We had asked him what happened, where he had been. So he started telling us about—he says, 'You won't believe this. It was the worstest dream I ever had in my life.'
>
> He started talking about a dream, and so we asked him what happened. And he said he went to the train station and—let's see—he started to the train station, I think, and he saw a man or met a man or something. Anyway, the next thing you know, he was in the train station and he was on a train, and he said it seemed like the train disappeared and then he was in a car or something, he was in a car, and the car stopped, and everything—it was all confusing—couldn't make no sense out of first. So I told him, 'Look, if you lay down maybe tomorrow morning when you wake up you can tell us what happened.'
>
> Q. Yes, what did he tell you? A. The next morning he woke up it was the same thing again. So he said he thought he heard—he was walking down the street or going down the street and he thought he heard a woman holler, a woman screaming, and the way he was talking, you know, you could tell it sounded like it was all confusion. You couldn't make heads or tails of what he was saying at first. And then he said something like he heard a woman screaming and he said he ran in this house and there was a man laying there in a pool of blood. And so we said,

'A man in a pool of blood?' He said, 'Yeah, I never seen so much blood.' And then a lady was screaming and hollering. He said she said something to him and he said he told her, 'Lady, you can't hurt me. I'm here to help you. I'm here to help you. I'm here to help you. The Lord won't let you hurt me.'

Q. The who? A. 'The Lord won't let me hurt you. I'm here to help you.' And that's all he remembered until he was home. That's as much as he said.

Q. Well, did he tell you whether he had gone any place after he left your house and before he went to, as you put it, the train station? A. Yes, he said he stopped by the bar and he had a beer.

Q. Did he tell you where the bar was located? A. No, but I presume it was—

Q. No, never mind what you presume. Did he tell you where it was located? A. No.

Q. Did either you or Shirley in your presence ask him where he had gotten the jacket? A. Yes.

Q. What did he say? A. He doesn't seem to know. He just said—at first he looked down at himself like this (indicating). He said, 'Jacket?' He said, 'Where is my shirt?' Like that, as if he didn't even know he had the jacket.

Q. Did he at any time tell you where he had gotten the jacket or how he got in possession of the jacket? A. No, he just seemed to think—he actually doesn't know how he got the jacket. All I know he looked down and the jacket was on. He had the jacket on."

At the time of the trial, Mr. Brown and Miss Stovall apparently were husband and wife and admittedly, Mr. Brown would very much like everything to come out all right for his new brother-in-law, Theodore Roosevelt Stovall (1970-1971). Nevertheless, Brown testified the defendant was not drunk when he came to the apartment at 9 o'clock (2005-2031) and when defendant left the apartment at 11 o'clock, he was a little high but "he wasn't high like he usually gets high when he drinks whiskey" (2035).

Continuing, the defendant's brother-in-law testified that when the defendant returned for a second time at about 1 o'clock he looked "about the same" (2039).

The Eye Witness

The most important identifying circumstances in the case was probably the testimony of Dr. Frances Behrendt (2045, *et seq.*) who, of course, met the defendant face to face in the kitchen of her home. According to Dr. Behrendt, her residence was closed up for the night (2050-2051) and she went to bed while her husband stayed up to hear the late news. At about 12 o'clock she was awakened by a noise and she spoke to her husband who went downstairs, after which she also went downstairs. Reaching the foot of the stairs, Dr. Behrendt testified that she observed the kitchen was lit up and she also saw the defendant and her husband in the kitchen facing each other.

In a nutshell, Mrs. Behrendt testified that the defendant had a knife and was about to stab her husband who had a telephone in his hand (2057-2058). At this point, Mrs. Behrendt declared that she jumped on the defendant and struggled with him as a result of which she was stabbed in the abdomen and fell to the floor critically wounded (2059). Her next recollected fact is that she saw her husband lying dead on the floor with the telephone in his hand. At this point, the defendant came back to Mrs. Behrendt and began to stab her in the back while she was lying helpless on the floor.

According to Mrs. Behrendt, the defendant also tipped over the refrigerator which fell to the floor narrowly missing her (2063). Mrs. Behrendt declared that she took a good look at the killer in the kitchen, which was well lit up, and heard him talk and she identified the defendant as the man who killed her husband and tried to kill her.

On cross-examination, Dr. Behrendt admitted that she didn't know if the defendant had a hat on or wore gloves, but she believes that he was wearing a light colored shirt (2130-2133). Also, Dr. Behrendt testified that she had scheduled a stomach examination for a patient for the following morning, which would be August 24th and her husband, as was his custom in such case, would not leave his white jacket in their office, which they shared, but he hung in on the chair, in the dining room so that he wouldn't have to disturb the patient during the examination (2134-2136).

The principal technical witness called by the People was Detective Eugene Reider (815, *et seq.*) who testified in effect that he went to the murder scene on the morning in question and he recovered what later proved to be the defendant's shirt from Detective Catapano who found it at the scene and he tested the shirt and discovered that it was covered with human blood—group A (2453-2460).

People's Exhibit 40 was the piece of cloth recovered by the Medical Examiner, Dr. Lucash, during the autopsy from under the armpit of the deceased and with reference to this exhibit, Detective Rieder tested it and concluded that it also contained human blood—group B, and that the blood of the deceased was group B (2466-2467). Detective Rieder also testified that he concluded from a microscopic examination that the piece of cloth discovered in the armpit of the deceased by Dr. Lucash had, in fact, been torn from the shirt found on the floor at the murder scene (2468).

People's Exhibit 21 was the tee shirt or undershirt found at the scene by Chief Thornton and this exhibit was tested by Detective Rieder who found that it contained human blood—group A (2478-2479).

People's Exhibit 31 was the defendant's black trousers seized by Captain Hynes incidental to the arrest of the defendant in his sister's home at 85 Wellington Road,

Hempstead. According to Detective Reider they were covered with blood—group A (2492).

People's Exhibit 30, which would be the Doctor's white coat belonging to the deceased, was checked and found to contain blood stains, but they were insufficient for grouping (2498).

The same conclusion was reached with regard to the defendant's pork pie hat (2505).

The same deduction was drawn from the results of the tests of the defendant's shoes which were found to contain human blood but inadequate for grouping.

People's Exhibits 22 and 23 were the knife handle and blade found on the table and kitchen floor respectively at the murder scene which Rieder determined microscopically went together. The witness also concluded that human blood—Group B was on the blade and human blood was on the handle, but it was insufficient for grouping.

According to Detective Rieder, the blood on the kitchen floor where the broken blade was found was Group B (2555) and the cane found at the murder scene contained human blood—Group B, as well as a piece of screen found on the floor which had been cut and torn away (2579-2595).

The witness also checked the broken panes of glass on the porch where he had concluded they were pushed out from the inside as in the case of someone breaking out, and Detective Rieder concluded the broken panes contained human blood but they were too small to type.

The witness also checked Mrs. Behrendt's bedroom and found it covered with human blood—Group A (2717), as was the hallway leading to the bedroom and also the inside of the bathroom (2726-2733).

Human blood—Group A was also discovered on a man's slipper recovered from the kitchen floor and it was also found on the top of both sides of the overturned refrigera-

tor, as well as on the kitchen cabinets and the chair (2744-2745).

Human blood—Group B on the other hand, was found in the area of the kitchen floor where the deceased was found and also on the cabinets directly at the point on the floor where the deceased was discovered (2748).

Detective Rieder also testified that he was at the autopsy and he took scraping from the fingernails of the deceased which proved to be negative.

According to the Detective, he also tested the clothes, such as they were, that the deceased was wearing and they proved to be stained with human blood—Group B (2783).

The witness also took scrapings from the defendant's fingernails at Police Headquarters, but he found no hairs, fibers or tissue, but all ten fingernails contained blood in quantities insufficient for grouping (2785).

The defendant's clothing at the time of the arrest had no blood stains (2787).

According to Detective Rieder, the deceased's blood was Group B and Mrs. Behrendt is Group A.

Rene Girodias was a neighbor of the victim and he was called to prove that he heard the murder even though he didn't recognize it and he called the police and finally, he testified that he saw someone leaving the area in a white coat.

The Bartender

James Joseph McGuire (3018, *et seq.*), was the bartender at the Oasis Bar and Grill, 433 Clinton Road, Hempstead, and one of the more important witnesses in the case. Mr. McGuire testified in substance that on the evening of August 23, 1961, the defendant first came into the bar for a drink and to make a telephone call. It was the opinion

of Mr. McGuire that the defendant was not drunk but there seemed to be something wrong with Stovall which he equated with drugs.

McGuire's relevant testimony is as follows (3023-3035):

"Q. And what conversation if any did you have with him at that time? A. When he came in he went to the telephone booth and made a telephone call and he came out—when he first came in he said, 'How come nobody talks to me when I ask questions?'

I said, 'They are looking at television. Nobody is bothering with you.'

Q. Said what? A. 'Everybody is looking at television and nobody's bothering you.' He came out of the telephone booth and he said he wanted a cup of coffee. He said, 'I don't want that in a cup.' Then he said, 'Can you get me a cab?'

The Court: He wanted a what?

A. (Continuing) A cab. I called a taxicab. He said, 'I don't want the coffee in a cup. I wanted it in a container, I'm going to take it with me.'

He said, 'Give me my change,' I said, 'You didn't give me any money.' He said, 'I give you money, give me my change.'

I said, 'You had better get your cab and there is a cab now,' and he walked out. And as he walked out I saw this big umbrella. I saw it in the telephone booth and I took it and gave it to him and he took off.

Q. Well, how about the coffee? What if anything did you do about the coffee? A. He took the coffee with him. We had an argument over the price. I mean, he wanted change. He said he gave me money.

Q. Did you give him coffee? A. Yes.

Q. In a container? A. That's right.

Q. And he went out. And what about the umbrella, what did you do about the umbrella? A. I ran to the door and I said, 'Here's your umbrella.' I said, 'Here's your umbrella, Johnny.

He said, 'Don't you call me Johnny. My name is Teddy.'

Q. I can't hear you. A. He said, 'Don't you call me Johnny. My name is Teddy.'

Q. That is this defendant here who was talking? A. That's right.

Q. And what happened after you gave him the umbrella outside? A. He went out and got in the cab.

Q. Did you see him again? A. I saw him about fifteen, twenty minutes later passing the place.

Q. Was he passing on foot or in a cab or what? A. On foot. He was walking.

Q. Now, you say that when he went in that telephone booth you say he made a telephone call; is that what you say? A. That's right.

Q. And could you hear any of the conversation? A. No, I couldn't, but he came out and he had a piece of paper with an address on it and come out and wanted to know how he could get to that address, someplace in Uniondale.

Q. He asked you how he could get to this address in Uniondale? A. That's right.

Q. What did you say? A. I tried to explain to him. Another couple of fellows and I tried to tell him how to get there but he was all jumbled up and he just didn't say any more about it. Then I gave him the umbrella and I saw this piece of paper in the telephone booth with a number on it.

Q. Well, we will get to that in a minute. Now, when you spoke to him about how to get to this address in Uniondale, will you explain to us how you came to call a cab. Did he ask for it or did you suggest it? A. No, he asked me to call a cab for him.

Q. You called the cab? A. Yes.

Q. What cab did you call? A. Larry's Cab in Hempstead.

Q. Larry's Cab in Hempstead? A. That's right.

Q. Now you started telling us that you found a slip of paper in the telephone booth after he left, is that correct? A. That's right.

Q. And did you see what was written on that slip? A. Telephone number.

Q. Do you remember what the telephone number was? A. No, I do not.

Q. What did you do with that slip of paper? A. I put it on the back bar for a while and I finally put it in my pocket and took it home with me.

Q. Were you contacted by the police at any time? A. No, none whatsoever.

Q. Well, I mean did there come a time when you did something with this telephone number? A. Well, who's his name came over that night when I went to work, a detective came over and brought me back to identify him.

Q. Well, I mean, did you keep that telephone number to yourself or did you give it to somebody? A. I gave it to the police. They called me up in the morning, early in the morning, half past 8 in the morning. I gave it over the telephone.

Q. Now after you last saw this defendant you say about 15 minutes after he got into the taxicab did you ever see him again while you were working. A. I saw him about two hours later.

Q. Where did you see him? A. He came back in the place. He came into the cafe.

Q. Did you have any conversation with him at that time? A. Well, he asked me for a drink and I said, 'No good. I'll give you a beer, Teddy, that's all.' So he had a white coat on and he said, 'How do you like this coat?'

I said, 'You look pretty good. Maybe you are going out with your girl friend.'

He said, 'Give me a drink.'

I said, 'I'll give you a beer.'

And he took the beer and he took off, no discussion whatsoever. He just drank the beer and went out.

Q. Now, about this white coat, you told us some conversation you had with him. Was there any further words you had with him as to that white coat? A. By that time I couldn't be sure what he said, whether he either got it off a day man or a dead man. I didn't know what he said. I couldn't be sure what he said.

Q. Either a day man or a dead man? A. That's right, I couldn't distinguish.

Q. So you couldn't know which expression he used. A. No, sir.

Q. And this was a couple of hours or so after you last saw him? A. That's right.

Q. Did you see him again after that? A. No, I never saw him again—yes, I did, when they brought me over to identify him.

Q. And that was when, if you know? A. I think that was the next night when I went to work there was a detective over there.

Q. Now, this telephone that you were talking about, I assume it is a booth, is that it? A. That's right.

Q. How does it operate? A. It's coin-operated.

Q. A coin-operated booth? A. That's right, closed booth.

Q. Is it a kind of a booth where you pick up the telephone, you give the number, or do you have to dial it? A. You have to dial it."

Warren Van Gelder (3097) and John L. Kelly (3108) were customers of the Oasis Bar & Grill and they corroborate so much of Mr. McGuire's testimony as relates to the first visit by Stovall to the Oasis Bar around 10:30.

James B. Edmondston (3134) was the taxicab driver who picked up the defendant at the Oasis Bar pursuant to the call from McGuire and he came to the conclusion very quickly that he might not get paid for the fare so he left the defendant out of his cab a block away.

Kathryn Maus (3165, *et seq.*) is a young girl who lives in the neighborhood of the crime and on the night in question, she was driving home with her friend, Peter Eischman, when she observed a colored man standing in the middle of Clinton Road, Garden City, waving his hands. According to Miss Maus, he was wearing a white coat.

Walter Girodeau (3193, *et seq.*) was a Negro male nurse, 62 years of age, who worked at the Meadowbrook Hospital in the psychiatric ward. On the night in question, which would be August 23, 1961, Mr. Girodeau was

in the vicinity of the railroad station in the Village of Hempstead to meet a friend of his who was in the Army in Jersey and who was on a 48 hour leave. Apparently, the Army buddy did not arrive and Mr. Girodeau met the defendant who he learned was named "Teddy" and in substance Teddy told him that he had only recently come North and he didn't have any friends, that he lived in Jamaica and had a sister living in Hempstead nearby. Accordingly, Mr. Girodeau invited him to his home to have dinner and a few drinks.

After eating and drinking some Bourbon, Girodeau drove Stovall to his sister's home on Wellington Street and returned to his own premises to go to bed. Later that evening, around 10 or 10:30, he received a telephone call from the defendant, and Stovall asked him if he would drive him to Jamaica. Mr. Girodeau said that he had loaned his car to a friend and that he wouldn't be around to accommodate the defendant.

Finally, the following morning, which would be August 24th, he received a telephone call from someone, whom we already know was Detective Rofheart, and he testified that he told Detective Rofheart that at 10:30 the night before, he had been called by Stovall about driving to Jamaica.

Cross-Examination

The cross-examination of Walter Girodeau, as well as the redirect and the recross (3223-3450) was very extensive, the gist of which is that Girodeau was a sex pervert who committed an indecent act with the defendant and may have been the murderer. There apparently was no evidentiary basis to suggest that Girodeau was in any way connected with the murder except for the fact that he was a hospital orderly and did, in fact, own some white coats such as those worn by orderlies and doctors. From

this fact, the inference apparently was to be drawn that he, in some way, was the murderer.

Compared to this offer was the fact that Dr. Behrendt's white coat was found in the defendant's room.

Shirley Stovall Brown (3454, *et seq.*) was the defendant's sister and she testified generally, that on the evening of August 23, 1961, she was entertaining her current husband, Mr. Brown, when her brother, the defendant, arrived to pay a little visit. She first saw him about 6 o'clock that evening when he stopped for five minutes and again at 8 o'clock when he stayed a little longer.

According to the witness, her brother left at about 11 o'clock to go back to his home in Jamaica and she went to bed. At about 12:30 the defendant returned for a third time dressed in a pair of bloody, black pants and a doctor's white jacket.

Mrs. Brown's testimony is not at material variance with that of her husband, Rosier Brown, who together testified that the defendant, when he left, was wearing dark trousers, a T-shirt, a white dress shirt and a pork pie hat, and when he returned he had a T-shirt, no dress shirt, but instead was wearing a white doctor's jacket.

Mrs. Brown described the bloody condition of her brother's clothes and she also questioned him about his appearance and she testified in substance, he said he heard a woman's cry for help, which he identified as his sister, and he ran in this house and found someone lying in a pool of blood and heard a woman cry and that the woman tried to hurt him and all the time he kept saying that he didn't want to hurt anybody and he went on his knees in the blood on the floor to pray. In effect, he concluded by saying that all of this was just like a dream (3471-3483).

The following morning when they got up, the witness questioned her brother once again about his condition and

appearance, and he admitted being in the Oasis Bar, but he couldn't specifically recall the whereabouts of the bloody scene described in his dream. The witness concluded her testimony describing her brother as being in a drunken, dopey condition.

The final witness called on the direct case of the prosecution was Michael Wowk, a stenographer who recorded a Question and Answer statement of the defendant taken at Police Headquarters on the 24th of August at about 9:46 P. M. by Assistant District Attorney William Cahn. The statement was introduced into evidence apparently without objection (3630-3646).

The defendant's Statement, which is reproduced as People's Exhibit 67 (4734-4776), was a completely negative statement. The defendant admitted meeting Girodeau and having a bite to eat with him, but he maintained that he went directly to his sister's home on Wellington Road, Hempstead, where he remained for the entire evening.

The statement represented a general denial, with no admissions against interest of importance. There was no explanation for the bloody condition of his clothes or the contradictory testimony of his sister and brother-in-law in connection with his successive visits to her home on the night in question.

The Defense

The first witness called in behalf of the accused was Melvin P. Gaddy, who lived at 85 Wellington Street, Hempstead, apparently in the same building with the defendant's sister, Shirley. Gaddy first saw the defendant about 4:30 or 5 o'clock on the afternoon of August 23rd, sitting in a car near the witness' home. At about 6:30 or 7 o'clock, the witness noticed that the car had disappeared. Ultimately, the witness went to bed, but was awakened in the middle of the night to answer a knock at the door and when

he did, he found the defendant who was wearing a white doctor's jacket and the defendant had blood on him.

According to Gaddy, he said that Teddy seemed to look strange and his speech was mumbly and he did not seem to know where he was going or what he was doing. In the opinion of Mr. Gaddy, the defendant's actions were those of an irrational person (3738).

On cross-examination Gaddy took the position that he couldn't say that the defendant was drunk or crazy (3750), but just that the defendant did not appear to be himself.

The second witness called by the defense was Deputy Chief Inspector John Lada (3762) who testified generally to the police routine at Headquarters after the defendant had been arrested and which he was being questioned. For the most part the testimony has no relevancy to this appeal particularly because there was no confession.

Chief Lada did testify that in his opinion the defendant did not appear to be dopey or give any indication of any incoherency and that he was absolutely rational (3776).

This concluded the defense to this case.

Rebuttal

The prosecution called Dr. Ernani D'Angelo (3810, *et seq.*), a psychiatrist, in rebuttal and he testified in answer to a hypothetical question (3816, *et seq.*) The Doctor concluded that Stovall knew the nature and quality of his act and knew that it was wrong.

Dr. D'Angelo examined the defendant at Police Headquarters on August 24, 1961 sometimes after the defendant had been arrested and before he was arraigned.

After the direct examination of Dr. D'Angelo was concluded, the defense moved curiously to strike the Doctor's

testimony on the ground that the prosecution had injected on rebuttal wholly irrelevant evidence. Apparently, the defense contended the prosecution had no right to offer affirmative proof as to the defendant's state of mind shortly prior, during and subsequent to the moment of the murder. The Judge overruled the objection (3866-3914).

The cross-examination of Dr. D'Angelo dealt primarily with the fact of a man being in the middle of the road, in the middle of the night, waiving his arms and not walking in a straight line. Of course, this fact has reference to the testimony of young Kathryn Maus (3165, *et seq.*) who had testified that a short distance from the murder scene on the night in question, she saw a colored man with a white coat on, in the middle of the road waving his arms.

An effort was made to change the Doctor's testimony as to whether a defendant, who had committed the crimes charged in the indictment, knew what he was doing if, in fact, he was waving his arms in the middle of the night, in the middle of the road near the murder scene. The Doctor maintained that this fact, in and of itself, did not change his opinion as it was equally consistent with the shock and hysteria which overcomes a person when the full impact or realization of the criminal act drives itself home.

POINT I

Fifth, Sixth and Fourteenth Amendments not violated by show up of defendant at hospital.

It is claimed that when Stovall was taken to the hospital room of Mrs. Behrendt for identification purposes, the circumstances were such as to interfere with his constitutional right to counsel; compel him unconstitutionally to be a witness against himself and generally to deprive him of due process. The District Attorney disputes this.

Chronological Sequence of Events

1. The murder occurred on the night of August 23, 1961.

2. Stovall was arrested at 4 o'clock the afternoon of August 24, 1961.

3. Stovall first appeared for arraignment the following morning, August 25, 1961, where he was advised of his right to counsel and the formal arraignment was adjourned to August 31, 1961 to permit Stovall to retain counsel.

4. Later the same day, August 25, 1961, Stovall was identified in the hospital by Mrs. Behrendt.

5. On August 31, 1961, the Committing Magistrate assigned veteran criminal lawyer, George Mulry, to represent Stovall. Counsel demanded an examination which was set down for September 1, 1961.

6. On August 31, 1961, the Grand Jury of Nassau County indicted Stovall for Murder.

As Regards the Show Up

In his opening the District Attorney *without objection* told the jury that Mrs. Behrendt had identified Stovall while still in the hospital (237-238). Also, in his opening the District Attorney cautioned the jury that Mrs. Behrendt hadn't seen the accused since, so he didn't know whether she would be able to identify him at the trial (*supra*).

The second mention of the fact came on the *cross-examination* of Detective Stalter by defense counsel. It is Detective Stalter's testimony, as we read it that he was handcuffed to Stovall when they entered Mrs. Behrendt's room at the hospital; that Chief Pinnell, Chief Farrell, Assistant District Attorney Cahn and Detective Rofheart were present, but he does not seem to have testified specifically that Mrs. Behrendt did or did not identify Stovall (1153-1155).

The third mention of the point occurred when Detective Rofheart was *cross-examined* by counsel for the defense, at which time Detective Rofheart testified unequivocally that Mrs. Behrendt identified Stovall as the man who " 'struck my husband down and cut me' " (1803).

Naturally, when Mrs. Behrendt was summoned, she testified on direct examination (2075-2076) *without objection* to the hospital room identification.[1]

Also, on *cross-examination* Mrs. Behrendt was interrogated extensively (2259-2280) on the prior identification and the circumstances surrounding it. As a matter of fact, counsel for the accused made a successful point because Stovall was the only colored man in the hospital room.

The claim is the trial in this regard fell below the minimum standards of the Fifth, Sixth and Fourteenth Amendments for Stovall was compelled, without counsel, to be a witness against himself by virtue of the "showup" at the hospital after the criminal proceeding had been commenced by the first arraignment on August 25, 1961. Not so (cf. *Schmerber* v. *California* [1966] 384 U.S. 757, pp. 763-764; *Miranda* v. *Arizona* [1966] 384 U.S. 436; *Vignera* v. *New York* [1966] 384 U.S. 436; *California* v. *Stewart* [1966] 384 U.S. 436; *Holt* v. *United States* [1910] 218 U.S. 245, p. 252; *Kennedy* v. *United States* [1965 D.C.] 353 F. 2d 462, pp. 464-467; *Caldwell* v. *United States* [1964 8th Cir.] 338 F. 2d 385; *People* v. *Gilbert* [1966] 63 Cal. 2d 290, 47 Cal. Rptr. 909, 408 P. 2d 365, No. 254, Oct. Term 1966, Supreme Court of the United States, *People* v. *Clark* [1963] 28 Ill., 2d 423, 192 N.E. 2d 851; *Redmen* v. *Commonwealth* [Ky. 1959] 321 S.W. 2d 397; *Commonwealth* v. *Downer* [1946] 159 Pa. Super. 626, 49 A. 2d 516; *State* v. *Hill* [1964] 193 Kan. 512, 394 P. 2d 106).

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[1] Mrs. Behrendt was not questioned on direct examination about the voice identification of Stovall. There was no reliance on a similarity so Stovall on the direct evidence at the trial was not convicted because he spoke at the show up at the hospital.

The Privilege Against Self-Incrimination

The privilege circumscribed by the Fifth Amendment has been so recently reconsidered by the Court in *Schmerber*, if not *Miranda*, *Vignera* and *Stewart*, that there can no longer be any doubt that the guarantee has reference to oral testimony as distinguished from pre-trial identification procedures, such as (*Schmerber* v. *California*, *supra*, pp. 763-764):

> "fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."

It would seem therefore, that it cannot be seriously suggested that the victim of an attempt to murder on death's own threshold may not look at her assailant without interfering with the Fifth Amendment rights of the suspect.

This is so for (*supra*, pp. 763-764):

> "The distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' [identification] does not violate [the Fifth Amendment]."

The Right to Counsel

Reasoning that Armando Schmerber had no Fifth Amendment privilege such as to preclude the taking of his blood, this Court concluded Schmerber had no greater right because counsel advised against it.

The court's finding with reference to Schmerber's Sixth Amendment right to counsel would seem to answer completely Stovall's primary thrust for reversal (Petitioner's Brief, pp. 12-15), that his right to counsel was interfered with because Dr. Frances Behrendt looked at petitioner in the hospital room after the commencement of the criminal prosecution.

For the reason that petitioner had no Fifth Amendment right not to exhibit himself for identification purposes, he has no greater right because he was without the benefit of counsel at the moment of truth.

Indeed, like Schmerber, had counsel advised against the "showup", no constitutional wrong would have been done Stovall if the command was ignored by the police, and the petitioner taken before his victim in the hospital.

Method of Identification Goes to Weight Not Competency

To the respondent, the principal thrust in petitioner's brief relates to the probative value and not constitutionality of the evidence regarding a prior identification. In this connection, it is settled everywhere that the *method* of identification goes to the weight, not competency (*People* v. *Crenshaw* [1962] 15 Ill. 2d 458, 155 N.E. 2d 597, cert. den. 359 U.S. 997; *Kennedy* v. *United States* [1965 D.C.] 353 F. 2d 462; Anno: Extrajudicial Identification 71 A.L.R. 2d 449).

The general rule was succinctly stated by the Illinois Supreme Court in the *Crenshaw* case as follows (p. 604):

> "There is no requirement in the law that an accused person must be placed among a group of persons for the purpose of testing the ability of a witness to identify him as the guilty person, * * * and where an accused is not selected from a group, such fact does not render evidence of identification incompetent but only affects its weight. * * * Similarly, where claim is made that identification was induced by police suggestion that the guilty party is in custody, * * * such procedure does not completely destroy the evidence of identification, but affects only its weight and credibility."

Just last year, Judge Burger in the United States Court of Appeals for the District of Columbia in the case of William W. Kennedy considered whether or not the accused had a right to be viewed in a line-up as distinguished from

a showup. From the published report, it would appear that Kennedy and another were arrested after robbing two women victims in their apartment. The screams of the ladies attracted the attention of two passers-by who captured Kennedy and had Kennedy in custody when the police arrived pursuant to a radio call. Kennedy was promptly marched into the apartment by the police where the victims were found handcuffed to a stair rail. Upon seeing Kennedy, the identification was made then and there.

In the Court of Appeals, Kennedy contended the showup was constitutionally bad. In rejecting the argument, Judge Burger concluded (*supra*, p. 466):

> "An accused has no right to be viewed in a line-up rather than singly."

Going on, Judge Burger recognized that "a lawyer on the scene might have *asked* the police to assemble a line-up before arranging a confrontation" (p. 466) but the police were under no constitutional obligation to comply. This is so because "At that stage police, not suspects, must be in control" (p. 466).

In the current case, it was the police and the District Attorney, not Stovall, who were still in control because of the duty still owed petitioner. The record evidence is Stovall was arrested at 4 o'clock the afternoon of August 24, 1961, and arraigned the following morning August 25, 1961.

Time

Undoubtedly, the police authorities would have preferred to confront Stovall with Dr. Behrendt earlier (cf. *Miranda* v. *Arizona* [1966] 384 U.S. 436; *Vignera* v. *New York* [1966] 384 U.S. 436; *California* v. *Stewart* [1966] 384 U.S. 436), and most assuredly prior to arraignment (*People* v. *Meyer* [1962] 11 N.Y. 2d 162), but the physical condition of Dr. Behrendt made this impossible.

It is undenied that Dr. Behrendt had undergone a traumatic experience what with observing the murder of her husband to say nothing of the eleven stab wounds inflicted upon her body by petitioner (613-614).

We have treated the nature of the wounds elsewhere in our brief in greater detail. Nevertheless, it needs repeating that Dr. Behrendt was stabbed repeatedly both front and back and that two of the lacerations were critical: one in the abdomen, and the other below the right shoulder blade, because of the numerous arteries severed and the extensive bleeding. The operative procedures were described in great detail by Dr. Montgomery (726, *et seq.*). The unescapable conclusion is:

1. Dr. Behrendt was physically incapable to view petitioner prior to the arraignment.

2. Dr. Behrendt throughout was in a critical condition.

3. Dr. Behrendt was the single witness who could exonerate Stovall.

To have failed or refused to bring Stovall to Dr. Behrendt's bedside because of the arraignment would have constituted a callous disregard of the rights of the accused by the authorities that might have reached frightening proportions had Dr. Behrendt, like her husband, succumbed to the wounds inflicted upon her by the petitioner if Stovall was innocent.

The law enforcement authorities in Nassau County are alert to the fact that the very heart stone of every criminal case is identification. Sound, thorough police procedures require that all identifying witnesses see the accused as quickly as possible to the end that justice will triumph.

Modern day transportation in this great country being what it is, it all too often is impossible to bring about the meeting prior to the arraignment. The first confrontation regularly occurs, we repeat, regularly takes place after the

criminal proceedings have commenced against the accused. For example:

1. At the actual arraignment before the Magistrate and while the defendant is still in the court room.

2. After the arraignment but before the defendant has left the scene of the court house freed on bail.

3. At the felony examination before the Magistrate 48 hours later.

4. When the case goes to the Grand Jury if defendant requests permission to appear and testify.

5. At the arraignment on the indictment.

6. After any arraignment if defendant is bailed or released in his own recognizance at one of his haunts.

7. In jail any time after any arraignment where defendant has not been bailed or is held on other charges.

But for whatever the reason, it surely cannot be that prejudice results if a victim views her attacker *before* trial whether it is *prior* or *subsequent* to the commencement of the court proceedings when we all agree the victim may view the accused much later, as during the trial, with no constitutional infringement (*People* v. *Winship* [1955] 309 N.Y. 311, pp. 313-314; *People* v. *Gardner* [1894] 144 N.Y. 119, pp. 127-129; *Swingle* v. *United States* [1954 10th Cir.] 151 F. 2d 512; *Panzich* v. *United States* [1933 9th Cir.] 65 F. 2d 550).

Unquestionably, the authorities, where possible, owe it to every accused to see to it that the confrontation takes place, not only as quickly as possible, but under circumstances that will be fair, else the result is of little probative value.

Maybe the opinion of Dr. Behrendt would be entitled to greater weight had the confrontation taken place at

police headquarters (*cf. Miranda* v. *Arizona* [1966] 384 U.S. 436) and the identification made from a line-up of five identical individuals. But it is our understanding that it has never been held that the time or circumstances of the identification will give rise to a Fourteenth Amendment question and petitioner cites no authority for this extraordinary claim.

The hospital show-up did not "offend a sense of justice" (p. 173), or "shock the conscience" (p. 172) or even come "close to the rack and the screw" (*Rochin* v. *California* [1952], 342 U.S. 165, p. 172) such as a stomach pump to induce vomiting to recover two capsules of morphine (*supra*).

The nature or composition of the line-up was but a fact to be considered with all others by the jury when weighing the testimony of Dr. Behrendt.

Finally, the fact looms large that petitioner was not convicted because of the hospital room identification, but the identification that occurred in the court room during the trial. As a matter of fact, Dr. Behrendt's court room identification would have carried greater weight had she never seen the petitioner in the hospital. It is plain to see that the circumstances of the hospital room episode did not strengthen Dr. Behrendt's identification, but in the eyes of the jury weakened it immeasurably.

While not necessarily controlling, we cannot help but note that Ernesto Miranda, Michael Vignera and Roy Allen Stewart all were looked at for identification purposes by the victim, or a crime witness as best can be determined from the published report of the Court. Miranda was identified in police headquarters, as was Vignera, both before the Court proceedings had commenced, whereas Stewart apparently was identified sometime after he had been placed in a cell and presumably after the criminal Court proceedings had commenced.

In ordering a new trial, this Court did not direct or even suggest the identification procedures ran afoul of the defendant's Fifth, Sixth or Fourteenth Amendment rights.

Specifically, in the case of Vignera, there was a "show-up" in the stationhouse in Brooklyn where the victims of the robbery identified Vignera. This Court did not hold, or even intimate that upon a retrial the victims should not be permitted to testify to the stationhouse identification of Vignera.

In conclusion, the petitioner suggests that if the Court is of a mind to reverse, then a voir dire should be conducted to determine the impact of the hospital room showup on the overall competency of Dr. Behrendt to identify the petitioner as the individual that she observed slay her husband. Of course, this is precisely what a trial is for and it represents the issue that should be resolved historically and traditionally by a jury.

In *Wade* v. *United States* [1966 5th Cir.], 358 F. 2d 557 cert. granted, October Term 1966 No. 334, the Court concluded that a line-up in the absence of counsel was prejudicial and upon a retrial the identifying witness not only would be incompetent to testify to the line-up, but was disqualified from giving any identification testimony regardless of the source or the circumstances of identification.

We believe the rule in such case is to the contrary (cf. *United States* v. *Blue* [1965], 384 U.S. 251).

Ben Blue was indicted for a criminal violation of the Income Tax Laws. His motion to dismiss the indictment was granted because in related proceeding Blue was compelled to incriminate himself. In reinstating the indictment, this Court concluded that exclusionary rules of the Court dealing with the Fourth Amendment (*Mapp* v. *Ohio* [1961], 367 U.S. 643), Fifth Amendment (*United States* v. *Blue, supra*), and Fourteenth Amendment (*Rogers* v. *Richmond* [1960], 365 U.S. 534) did not warrant a barring of the

prosecution. In this regard, the Court in *Blue* declared (p. 255):

> "Our numerous precedents ordering the exclusion of such illegally obtained evidence assumes implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

No more is required here, in the event of a retrial, than to omit Dr. Behrendt's testimony with the reference to the hospital room confrontation.

CONCLUSION

The order should be affirmed.

Respectfully submitted,

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